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No. 96-1798

In The
Supreme Court of The United States
October Term 1996

CHRISTINA LEAP AND PAUL SIPPLE, INDIVIDUALLY AND PAUL SIPPLE, EXECUTOR OF THE ESTATE OF MARTHA ROSE SIPPLE, DECEASED,
Petitioners,

v.

PAUL MALONE, ALLOY FABRICATORS, INC. AND F & K LEASING, INC.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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III. INTRODUCTION

In her initial brief, Petitioner demonstrated that the decision below conflicts with the decisions of the Second, Fourth, Fifth, Eighth, Ninth & Tenth Circuits concerning conclusive effect of expert testimony on an issue such as economic calculations which only an expert is competent to calculate. Petitioner further demonstrated that the panel decision conflicts with the Sixth Circuit's own precedent including Roth Office Equipment Company v. Gallagher, 172 F. 2d 452 (6th Cir. 1949) and the decision to do so without an En Banc Hearing therefore violates the doctrine or Stare Decisis.

Finally, petitioner has shown that the U.S. Supreme Court does not authorize a jury to speculate on its own where a complex question requires the aid of expert testimony in order to resolve it.

A. THE COURTS OF APPEAL DO NOT PERMIT A JURY TO SPECULATE ON A COMPLEX ECONOMIC CALCULATION WHICH REQUIRES THE AID OF AN EXPERT TO RESOLVE IT.

What the Appellee is arguing is that the jury may disregard the range of

evidence presented by the only economic expert and independently compute present value of permanent loss of earning capacity while accepting the expert's premise that Appellant was permanently impaired and suffered wage loss as a result. Appellee has cited no cases that contradict the rule enunciated in Roth, supra. Stafos v. Missouri Pacific Railroad Company, et. al., 67 F.2d 314 (10th Cir. 1966); Aetna Life Ins. Co. vs. Kelley, 70 F.2d 589 (8th Cir. 1934); Greenfeld v. C.I.R., 165 F.2d 318 (4th Cir. 1948); Charles of the Ritz Distrib. Corp. vs. F.T.C., 143 F.2d 676 (2nd Cir. 1944); N.L.P.B. vs. Ray Smith Transport Co., 193 F.2d 142 (5th Cir. 1952); Security First Natl. Bk. of L.A. vs. Lutz, 322 F.2d 348 (9th Cir. 1963) or Fitts Estate v. C.I.R., 237 F.2d 729 (8th Cir. 1944). As shown by these cases, the Courts of Appeal have consistently held that with respect to complex matters of which laymen are not expected to have reliable knowledge and information, the testimony of the expert cannot be ignored by the trier of fact in making their decision. Reduction of the amount of permanent loss of earning capacity to present economic value is an economic calculation of such sophistication involving so many statistical variables

that laymen cannot possibly have the knowledge and skill necessary to make such a computation. If it were not so, no expert economic testimony would be required in order to put the amount of such damages before the jury.

While Appellant and Appellees do agree with the limited position that the jury did have discretion to disregard Dr. Gamboa's testimony entirely and award nothing for lost earning capacity, once the jury decided that Ms. Leap had, in fact, suffered permanent lost earning capacity, as it obviously did by awarding $100,000.00, there is no discretion to disregard the range of evidence produced by the only competent economic expert to give testimony in this case in the absence of some alternative computation. While the Defendants attempted to raise questions on cross examination concerning whether or not Tina Leap should be confined to a sheltered workshop environment for the duration of her worklife expectancy, Dr. Gamboa (the only witness to testify concerning the economic impact of the loss of earning capacity) most clearly stated his opinion that a loss of over $900,000.00 was the optimistic view and that a pessimistic view could be taken in which event the

jury's award should be $1.4 million dollars.

Obviously, Dr. Gamboa qualified his opinion expressing the most conservative position which assumes that Ms. Leap will in fact complete a college degree and obtain employment at $20,000.00 per year in average income on a present value basis as opposed to the estimated $36,000.00 per year which Gamboa conservatively stated that she would have earned but for the permanent disability that she sustained.

Moreover, the Appellees have not cited any testimony whatsoever which contradicts the medical experts 20% permanent disability rating which was clearly part of the record. Appellees do not dispute this disability rating, they merely suggest maybe Tina will improve. Appellees wish to be rewarded with the benefit of the doubt that perhaps some day Tina Leap might show improvement which no expert determined.

Despite Appellees concessions as to the seriousness of Tina's injuries and the extensive nature of her hospitalization and therapy, the Appellees persist in their brief to

understate the impact of these injuries on her neuropsychological function and her cognitive performance academically and vocationally.

It is undisputed that Tina was in a comatose state for at least twenty-seven (27) days after the accident (R. 78: Carol Sipple at TR 93). It is undisputed that the closed head trauma sustained in the accident left her with brain dysfunction including dead brain tissue, increased susceptibility to seizures and resulting overall permanent disability of 20% to the whole person (R. 80: Dr. Dennis Sprague at TR 277 and P. Ex. 60 - Rpt of Dr. Dennis Sprague; R. 80: Dr. Anthony Gamboa at TR 288; R. 79: Carol Sipple at TR 159; P. Ex. 55 - EEG Rpt of Dr. Nancy McDonough).

The effect of these injuries on Tina's academic performance is also undisputed. Contrary to Appellees misinterpretations of this testimony, it is uncontradicted that Tina took psychology and chemistry as part of her therapy regimen and it took six (6) to nine (9) months for her to complete these courses even though the material covered in both courses only consisted of two (2) or three (3) chapters and one (1) exam

for each course. (R. 78: Carol Sipple at TR 135-137; R. 80: Tina Leap at TR 248-249). While she eventually completed a pre-calculus course after the accident, Tina required daily tutoring; tutoring before each test; and on weekends. Notwithstanding this extensive tutoring, she received a "C" for the course. (R. 79: Carol Sipple at TR 150-152; R. 80: Tina Leap at TR 251-253).

The other courses which Tina completed also required extensive tutoring in order to complete, including first aid and safety, and sociology which required daily tutoring, tutoring before each test and on weekends for the course work. Other courses had not been completed at the time the trial took place. (R. 79: C. Sipple at TR 150-152; R. 80: Tina Leap at TR 251-253). The effect of Tina's injuries on her cognitive function and academic performance is evident. Dr. Sprague's disability determination of Tina's 20% disability to the whole person has not been contradicted.

Appellees contention that Dr. Gamboa did not rely upon the medical reports and findings of Tina's treating physicians is incorrect. Dr. Gamboa

clearly testified that he relied upon the medical reports and findings of Tina's treating physicians, psychologists and therapists including Dr. Dennis Sprague, Dr. David Greenwald, Christina Ferguson, Karen Roberts, Angela Henson, Dr. Ron Koppenhoefer, Kristen Keiper and Dr. Nancy McDonough (R. 80: Dr. Anthony Gamboa at TR 314-315).

While Appellees contend that Dr. Gamboa did not review a list of all the college courses which Tina had completed or in which she was enrolled, Dr. Gamboa clearly testified that additional information about Christina was supplied to him during the seven (7) month interval between his initial report and the trial and that this information was considered in arriving at the "... best representation of her future loss in earning capacity ..." (R. 80: Dr. Anthony Gamboa at TR 285). As described by Dr. Gamboa:

> "The low end ($906,000.00) is an extraordinarily optimistic prediction. The high end ($1,400,000.00) represents a dollar

> figure that assumes she will never earn money as an employee for the remainder of her life. The best representation of her lost earning capacity is within those two figures. Where it is, I can't tell you, but it's between these two. (R. 80: Dr. Anthony Gamboa at TR 285-286).

In summary, while the jury had authority to disregard Gamboa's testimony and award nothing, once it decided to make an award for permanent lost earning capacity, the only economic testimony provided by the expert in this area was required to be used as a basis for the range of evidence. This was not done. Thus the remedy of Additur or a New trial on this issue was the appropriate response which the Trial Court should have granted and which decision the Court below should have reversed and remanded.

B. <u>WHETHER THE SIXTH CIRCUIT'S DECISION IS IN CONFORMITY WITH STARE DECISIS IN THE CIRCUIT.</u>

Contrary to Respondent's arguments, the herein decision by the Panel was not in conformity with the Stare Decisis of the Circuit as set forth in Roth Office Equipment, Co. vs. Gallagher, 172 F.2d 452 (6th Cir. 1949) and the decision to do so without an En Banc Hearing of the Sixth Circuit violates the Doctrine of Stare Decisis. Roth held that unimpeached, uncontradicted testimony from a well qualified witness should not be disregarded by the Court, and such testimony should be accepted by the finder of fact (jury) regarding matters in which the fact finder has no knowledge or experience in which he can exercise independent judgment. In a later decision Sheppard vs. Maxwell, 346 F.2d 707, (6th Cir. 1965) reversed on other grounds 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d. 600 (1966), the Sixth Circuit found there are some circumstances in which expert testimony must be accepted if formally uncontradicted where it concerns or touches upon matters on which no jury can exercise independent judgment because it has no knowledge or experience on which it can exercise such independent judgment.

This was precisely the case in this action where the jury had no knowledge or

experience in complex economic theory including but not limited to the sophisticated mathematical calculations by which the total amount of future wage losses are reduced to present value. The only testimony introduced into evidence on this question was provided by Dr. Anthony Gamboa, who was imminently qualified to render his opinion and was admitted as a qualified expert. In fact, evidence of the present value of such wage losses could not be admitted into evidence without the aid of expert testimony for this very reason. His testimony therefore constituted controlling evidence on which the jury's conclusion should have been based and it should not have been permitted to be disregarded. Failure of the Sixth Circuit to recognize and apply this principle violates its own precedent.

For all these reasons, the decision below should be reviewed by this Court and reversed.

C. WHETHER THE CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT DECISIONS.

Contrary to Respondent's position in its Brief, the decisions of the Supreme Court do not permit the jury to determine

on its own sophisticated matters such as reduction to present value computations once it has decided that a party is entitled to an award. In this area the jury must, of course, give recourse to the only technical expertise available to it, which in this case was solely testimony of Dr. Anthony Gamboa. The Defendants took the risk of not producing expert testimony with which to justify its position that no future wage loss should be awarded and lost their gamble. The jury decided to award Plaintiff lost wages as evidenced by its jury verdict in which it arbitrarily selected the number $100,000.00 to satisfy its decision that she was entitled to such an award. However, this figure does not relate to any testimony by the only expert to provide any technical assistance to the jury which assistance was required in order for such evidence to be introduced in the first place.

The Supreme Court in no decision has held that the jury is free to speculate outside the expert testimony on a matter in which they could not possibly have the expertise necessary to make the required calculation in such a sophisticated matter.

This Court has addressed the nature and scope of an expert's qualifications in Daubert vs. Merell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) in which the Court set forth the standards for evaluating the methods and procedures on which expert opinions are based and whether such opinions can be applied to the facts in issue. Having concluded that the expert is in fact testifying to opinions which are based upon data which is reliable and that the testimony of the expert is based on credible research, the Court has never held that such testimony can then be disregarded by a jury once it decides to award damages based upon factors which can only be interpreted and computed by such an expert.

In Quock Ting vs. United States, 140 U.S. 417, 11 S.Ct. 733 and 35 L.Ed. 501 (1891), the Court made it clear that as a general rule positive testimony as to a particular fact uncontradicted by anyone should control the decision of the Court. [See Quock Ting, supra 140 U.S. 417, 420, 11 S.Ct. 733, 734, 35 L.Ed. 501 (1891).] This Court, to Petitioner's knowledge, has never allowed the jury to speculate as to a result which only expert testimony could justify. Therefore the

opinion below is due to be reversed.

V. CONCLUSION

It is clear that as a result of her life threatening injuries caused by Defendants, Tina Leap suffered a devastating reduction in her quality of life, which affects everything she does, including but not limited to, whatever limited vocational opportunity she may have and which necessitates almost daily tutoring and other assistance. Notwithstanding the fact that Tina may complete her college degree, she will never be capable of functioning at the same level of quality and endurance as before this terrible accident.

Tina Leap relied on the principle that unimpeached, uncontradicted evidence from an expert witness on a complex matter such as reduction of her future wage loss which could not have even been introduced into evidence before the jury without such testimony would, in fact, be the basis on which the jury would make its decision. Tina was unfairly deprived of the consistent, predictable administration of justice when the panel violated the Doctrine of Stare Decisis in its decision and when the Panel affirmed

the lower court's erroneous determination.

While the jury has a sovereign right to weigh the evidence and reach a verdict, the Court has a concomitant responsibility to reject that verdict if it is not supported by the evidence. These two responsibilities are co-extensive under the Seventh Amendment to the Constitution.

If the evidence clearly points to a single conclusion which is the only reasonable conclusion and the jury fails to so find, the Trial Court must protect the judicial process as the lower court should have done here, by granting an appropriate remedy, which in this case would have been either additur under Tennessee Law or a new trial. Similarly the Sixth Circuit decision erred by failing to reverse the District Court and this case cries out for relief before this Court which is Plaintiff's last, best hope of achieving just compensation for her irretrievable losses.

For these reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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